

**JUL 14 2006**

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**U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MAXIMINO ALEXANDER SORDO,

Defendant - Appellant.

No. 05-10155

D.C. No. CR-03-40018-CW

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Northern District of California  
Claudia Wilken, District Judge, Presiding

Argued and Submitted April 3, 2006  
San Francisco, California

Before: FERGUSON, TROTT, and KLEINFELD, Circuit Judges.

Maximino Alexander Sordo appeals the sentence imposed following his guilty plea to conspiracy to commit robbery in interference with interstate commerce, and robbery in interference with interstate commerce, in violation of 18 U.S.C. § 1951 (the Hobbs Act). Sordo contends that the District Court applied the

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

wrong evidentiary standard in determining facts that enhanced his sentence; that there was insufficient proof that it was reasonably foreseeable to him that a weapon would be brandished during the robbery; and that the District Court abused its discretion in failing to hold an evidentiary hearing regarding the amount of property stolen. Sordo's arguments are without merit and we affirm the District Court.

We review de novo whether a district court applied the correct evidentiary standard during sentencing. *United States v. Dare*, 425 F.3d 634, 638 (9th Cir. 2005). We review factual findings for clear error, *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006), including the district court's determination that a co-conspirator's actions were reasonably foreseeable, *United States v. Lavender*, 224 F.3d 939, 941-42 (9th Cir. 2000). We review the district court's decision whether to hold an evidentiary hearing for an abuse of discretion. *United States v. Real-Hernandez*, 90 F.3d 356, 362 (9th Cir. 1996).

## I.

Sordo's first argument is that the District Court erred in failing to apply a beyond a reasonable doubt standard to determine facts that were disputed during sentencing. This argument is foreclosed by *United States v. Dare*, in which this Court, subsequent to the Supreme Court's decision in *United States v. Booker*, 543

U.S. 220 (2005), held that the preponderance of the evidence standard generally remains the appropriate standard for determining facts used for sentencing. 425 F.3d at 642 (citing *United States v. Howard*, 894 F.2d 1085, 1089 (9th Cir. 1990)).

Sordo alternatively contends that a higher evidentiary standard is required in his case given the disproportionate impact of the sentencing enhancements applied by the District Court. Prior to *Booker*, our Circuit established an exception to the general preponderance of the evidence standard. We held that when “the combined impact of contested sentencing enhancements is disproportionate relative to the offense of conviction,” due process requires that the factual basis for the enhancements be determined by clear and convincing evidence. *United States v. Riley*, 335 F.3d 919, 925 (9th Cir. 2003). We recently held that the “disproportionate impact” rule continues to apply under the advisory Guidelines system. *United States v. Staten*, 450 F.3d 384, 394 (9th Cir. 2006) (explaining that *Booker* “has no impact on the due process concerns [underlying the disproportionate impact rule]”).

Sordo’s contention that a higher evidentiary standard is triggered in his case is without merit. First, we exclude from our assessment of disproportionality any enhancements based on the scope of the crime to which Sordo pled guilty. Such enhancements reflect the scope of the conviction, and as such are “on a

fundamentally different plane” than enhancements based on uncharged conduct. *Riley*, 335 F.3d at 926; *United States v. Johansson*, 249 F.3d 848, 857 (9th Cir. 2001) (refusing to apply the clear and convincing evidence standard to enhancements based on “the nature and extent of the offense” as opposed to “acquitted or uncharged crimes”). Accordingly, we exclude from our assessment Sordo’s enhancement based on loss amount, since this enhancement merely reflects the extent of the robbery conspiracy to which Sordo pled guilty. *See United States v. Harrison-Philpot*, 978 F.2d 1520, 1523-24 (9th Cir. 1992) (declining to apply the clear and convincing evidence standard to determine the amount of drugs distributed, since that amount merely reflected the scope of the underlying conspiracy).

Putting to one side the amount-of-loss enhancement, the remaining enhancements – for brandishing a weapon and obstructing justice – increase Sordo’s offense level by five and fall significantly short of doubling his sentencing range. Under the totality of the circumstances, we conclude that these enhancements did not have an extremely disproportionate effect on Sordo’s sentence and thus do not trigger application of the higher clear and convincing evidence standard. *See Riley*, 335 F.3d at 927 (concluding that enhancements that increased the defendant’s offense level by four and did not more than double his

sentencing range did not have an extremely disproportionate impact, and as such need not have been determined by clear and convincing evidence). We uphold the District Court's application of a preponderance of the evidence standard.

## II.

Sordo's second argument, that the District Court erred in imposing a three-level enhancement for brandishing a dangerous weapon, is similarly without merit.

U.S.S.G. § 2B3.1(b)(2)(E) provides for a three-level enhancement "if a dangerous weapon was brandished, or possessed," during a robbery. Since co-conspirators are responsible for "all reasonably foreseeable acts and omissions of others in furtherance of the [conspiracy]," U.S.S.G. § 1B1.3(a)(1)(B), Sordo is subject to a three-level enhancement if it was reasonably foreseeable to him that a knife would be brandished during the course of the jewelry heist.

Based on Sordo's admission to committing a Hobbs Act robbery, the District Court found it to be true by a preponderance of the evidence that it was reasonably foreseeable to Sordo that a dangerous weapon would be brandished. Sordo contends that the characteristics of a Hobbs Act robbery alone provide insufficient proof that display of a dangerous weapon was foreseeable to him. Without reaching the question of foreseeability based on the nature of a Hobbs Act robbery, we uphold the District Court's application of the three-level enhancement based on

additional, undisputed facts demonstrating that use of a knife was reasonably foreseeable to Sordo. *See Riley*, 335 F.3d at 928-29 (upholding the district court’s application of an enhancement based on additional, established facts in the record).

It is a well-settled proposition in this Circuit that when “co-conspirators are few in number and know each other well, the court may infer that each participant knew the others’ ‘methods of operation.’” *United States v. Garcia*, 909 F.2d 1346, 1350 (9th Cir. 1990) (citation omitted). In this case, the undisputed facts indicate that there were only five co-conspirators to the jewelry heist. Sordo had previously been arrested with one of these co-conspirators, Godinez, in relation to the theft of several thousand dollars’ worth of retail merchandise in 2000. Sordo had also participated in a jewelry heist in 2001 during which his co-conspirators assaulted the victim with a knife. Additionally, Sordo’s role in the current robbery was not peripheral – the conspirators planned for Sordo to participate in the actual robbery. Given that Sordo was to be present at the scene of the heist, the District Court could reasonably have concluded that he was informed of how the robbery was to be accomplished. *See Lavender*, 224 F.3d at 942 (finding a co-conspirator’s use of a dangerous weapon to be reasonably foreseeable to the defendant because the robbery was “coordinated in terms of timing and in terms of role selection and it

was planned out what everybody was supposed to do”; under these circumstances, the law “assumes that each participant is aware of the others’ general plans”).

The small number of conspirators, Sordo and Godinez’s previous association, Sordo’s previous participation in a jewelry heist where a knife was used, and Sordo’s central role in the current robbery demonstrate that the District Court did not clearly err in finding that it was reasonably foreseeable to Sordo that a weapon would be brandished during this jewelry heist. The District Court was entitled to rely on all of the foregoing facts, which were not disputed, in sentencing Sordo. *United States v. Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005) (en banc) (the district court may “rely on undisputed statements in the PSR at sentencing”). Since these facts adequately support the District Court’s finding of reasonable foreseeability, we uphold the enhancement applied to Sordo’s offense level for brandishing a dangerous weapon. *See Riley*, 335 F.3d at 931 (“[A]n uncontradicted PSR alone is sufficient to uphold a district court’s findings.”).

### III.

Finally, Sordo appeals the District Court’s decision not to hold an evidentiary hearing regarding the value of the jewelry stolen. U.S.S.G. § 2B3.1(b)(7)(D) provides for a three-level enhancement if the loss from a robbery exceeds \$250,000. The District Court in this case was presented with a signed

statement by one of the victims of the robbery averring that the loss amount was about \$400,000. Sordo's co-defendant agreed in his plea that this was the proper calculation of loss amount. Sordo has not proffered any evidence to controvert the Government's showing that \$400,000 is the correct loss amount, nor has he indicated what amount he might seek to prove. Sordo's vague assertion that an independent appraisal of the jewelry might yield a loss amount of less than \$250,000 is speculative at best. The District Court did not abuse its discretion in declining to hold an evidentiary hearing before applying the three-level enhancement for loss amount.

For the foregoing reasons, the District Court's decision is AFFIRMED.